

**TMA Constr. v Community Preservation Corp.**

2013 NY Slip Op 32478(U)

October 9, 2013

Supreme Court, New York County

Docket Number: 650961/13

Judge: Eileen A. Rakower

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. EILEEN A. RAKOWER

PRESENT: \_\_\_\_\_
Justice

PART 15

TMA Construction

INDEX NO. 650961/13

-v-

MOTION DATE \_\_\_\_\_

The Community Preservation Corp., et al.

MOTION SEQ. NO. 001

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s) 1, 2, 3

Answering Affidavits — Exhibits \_\_\_\_\_ No(s) 4, 5, 6

Replying Affidavits \_\_\_\_\_ No(s) 7

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 10/9/13

[Signature] J.S.C.
HON. EILEEN A. RAKOWER

- 1. CHECK ONE: [ ] CASE DISPOSED [X] NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: [ ] GRANTED [ ] DENIED [ ] GRANTED IN PART [ ] OTHER
3. CHECK IF APPROPRIATE: [ ] SETTLE ORDER [ ] SUBMIT ORDER
[ ] DO NOT POST [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 15

-----X

TMA CONSTRUCTION,

Plaintiff,

- v -

THE COMMUNITY PRESERVATION CORP. and  
471 WEST 145<sup>th</sup> STREET HOUSING DEVELOPMENT  
FUND CORPORATION,

Defendants.

-----X

Index No.  
650961/13

**DECISION  
and ORDER**

Mot. Seq. 1

HON. EILEEN A. RAKOWER, J.S.C.

This action alleges breach of contract and breach of quasi-contract/unjust enrichment against defendants The Community Preservation Corp. ("CPC") and 471 West 145<sup>th</sup> Street Housing Development Fund Corporation ("471 HDFC") and seeks to recover \$184,000 that plaintiff allegedly advanced on behalf of 471 HDFC.

The Complaint alleges that Plaintiff TMA Construction ("Plaintiff"), as general contractor, and defendant 471 HDFC, as property owner, entered into a Construction Contract, pursuant to which Plaintiff was to perform services with respect to the construction and/or renovation of the subject property. The Complaint alleges that the Construction Contract required Plaintiff to provide a construction security deposit to defendant CPC in the amount of \$184,000 which was to be returned upon the completion of Plaintiff's work, that Plaintiff provided said security deposit to CPC, and that defendants 471 HDFC and CPC breached the Contract by failing to return the deposit upon the completion of Plaintiff's work.

Presently before the Court is defendant CPC's motion to dismiss Plaintiff's Complaint, pursuant to CPLR §§3211(a)(1) and (7). Plaintiff opposes CPC's motion

and further, cross moves pursuant to CPLR §3215 for a default judgment against defendant 471 HDFC. Defendant 471 HDFC does not oppose.

### Defendant CPC's Motion to Dismiss

In support of its motion to dismiss, CPC submits the affirmation of Andrew W. Gewell, which annexes a copy of the Complaint and a copy of the Pledge Security Agreement, dated June 29, 2006, entered between CPC, as Lender, and defendant 471 HDFC, as Pledgor.

CPLR §3211 provides, in relevant part:

(a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(1) a defense is founded upon documentary evidence;

(7) the pleading fails to state a cause of action.

In determining whether dismissal is warranted for failure to state a cause of action, the court must “accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory.” (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]).

On a motion to dismiss pursuant to CPLR §3211(a)(1), “the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted). “When evidentiary material is considered, the criterion is whether the proponent of the pleading *has* a cause of action, not whether he has stated one.” (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]) (emphasis added). A movant is entitled to dismissal under CPLR §3211 when his or

her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint. (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted).

Turning the four corners of the Complaint, and accepting all allegations as true, the Complaint sets forth a claim as against CPC based on CPC's alleged receipt of funds deposited by Plaintiff and CPC's refusal to return said funds upon completion of Plaintiff's work as required under the alleged contract. Furthermore, CPC's submission does not flatly contradict the legal conclusions and factual allegations of the complaint.

### Plaintiff's Cross Motion

Plaintiff cross moves, pursuant to CPLR §3215, for an Order default judgment as against defendant 471 HDFC in the amount of \$184,000 plus interest from September 1, 2010 based on 471 HDFC's failure to appear, answer, or otherwise move with respect to the Complaint. In support, Plaintiff submits the attorney affirmation of Gayle A. Rosen and Thomas Zoitas, Plaintiff's President. Defendant 471 HDFC does not oppose.

Attached to Rosen's affirmation is a copy of the an Affidavit of Service attesting to service of a copy of the summons and Verified Complaint on defendant 471 HDFC on March 28, 2013 and proof of additional mailing on 471 HDFC in accordance with CPLR 3215 on June 30, 2013. Rosen avers that defendant 471 HDFC has failed to appear, answer, or otherwise move with respect to the Complaint.

As set forth in Zoitas' affidavit, Plaintiff, a general contractor, and defendant 471 HDFC entered into an agreement for the renovation of the subject property, Plaintiff paid \$184,000 as a deposit pursuant to the agreement, Plaintiff completed the required work, and despite demand, defendant 471 HDFC has failed to repay the deposit to Plaintiff.

Although it appears that defendant 471 HDFC e-filed an Answer on August 30, 2013, defendant 471 HDFC appears to have done so without requisite leave of Court

or the parties' consent.

Wherefore, it is hereby

ORDERED that defendant The Community Preservation Corp.'s motion to dismiss is denied; and it is further

ORDERED that plaintiff TMA Construction Inc. cross motion for default judgment as against defendant 471 West 145<sup>th</sup> Street Housing Development Fund Corporation is granted without opposition; and it is further

ORDERED that the Clerk enter judgment in favor of Plaintiff TMA Construction Inc. and against defendant 471 West 145<sup>th</sup> Street Housing Development Fund Corporation in the amount of \$184,000, together with interest as prayed for allowable by law (at the rate of 9% per annum from March 18, 2013) until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: October 9, 2013



---

EILEEN A. RAKOWER, J.S.C.